United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1559

To be argued by
JAMES A. MOSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1559

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT MICHAELSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Robert Michaelson appeals from an order of the Honorable Kevin T. Duffy, entered in the United States District Court for the Southern District of New York on November 22, 1976, denying Michaelson's motion to withdraw his guilty plea to Count Four of Indictment 76 Cr. 503 and from his judgment of conviction entered on that count on the same date.

Indictment 76 Cr. 503 was filed on May 25, 1976, in four counts. Count One charged Michaelson and six others named as defendants with conspiracy to file false documents with the United States Department of State and to violate the Gun Control Act of 1968, in violation of Title 18, United States Code, Section 371. Counts Two, Three, and Four charged Michaelson and his six

ment. (App. 18-27).* After a two week trial, the jury convicted the remaining two co-defendants on each count of the indictment submitted to the jury.

On November 5, 1976, the date originally set for sentencing, Judge Duffy adjourned the sentencing date as to all defendants until November 22, 1976. On November 18, 1976, Michaelson's attorney submitted a letter to Judge Duffy requesting a further adjournment of Michaelson's sentence, citing his need to digest 300 pages of "extremely volatile material" and to present evidence that was "never brought to the Court's attention through trial." (App. 29-30). This request was denied by the Court. (See the affidavit of Barry Ivan Slotnick submitted to this Court and sworn to on November 29, 1976, at ¶ 8).

On the following day, September 19, 1976, Michaelson moved to withdraw his plea on the grounds that (i) the Government violated a plea agreement by assessing for the Probation Office his relative culpability, (ii) he had committed the crime to which he pleaded guilty out of fear for his life, (iii) the Government had not disclosed to him prior to his plea that the Government informant in this case "was a real life gangster," and (iv) Michaelson related an insufficient factual basis for the Court to accept his plea. (App. 32-41). In reply, the Government submitted a memorandum of law and an affidavit sworn to on November 22, 1976 by Assistant United States Attorney James A. Moss, demonstrating that the Government had not violated its pre-pleading understanding with Michaelson (App. 51-52), and that Michaelson's own

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* References to Michaelson's appendix are herein abbreviated as "App."; to Michaelson's brief on appeal as "Br."; and to the transcript of the trial as "Tr."

statements during his plea allocution established his guilt and rebutted the defenses of coercion and entrapment, which he was belatedly seeking to raise. (App. 52-53).

On November 22, 1976, Judge Duffy again denied Michaelson's request for an adjournment and, as well, refused Michaelson permission to withdraw his guilty plea. Michaelson was then sentenced by the Court to a period of five years imprisonment. The Court then granted Michaelson's motion to dismiss as to Michaelson Counts One, Two and Three of the indictment. The Court further denied Michaelson's request for "bail pending appeal in view of the motions he has made," ruling that the motions "are totally without substance." (App. 55-65).

ARGUMENT

POINT I

The District Court properly denied Michaelson's request for permission to withdraw his plea of guilty.

Michaelson contends that the District Court abused its discretion when it refused him permission to withdraw his plea of guilty to Count Four of this indictment, which Michaelson voluntarily entered on the third day of his trial. Specifically, Michaelson argues that Judge Duffy's ruling was error in light of the combination of factors presented to Judge Duffy: Michaelson's resurrected desire to assert an entrapment defense coupled with a lack of prejudice to the Government in his doing so and a purported breach by the Government of a plea bargain agreement. (Br. 13-15). However, Michaelson's claim of entrapment, contradicted as it is by his own statements at the time of his guilty plea, was properly rejected by the District Court. Moreover, Michaelson's arguments

overlook the very obvious and substantial prejudice that would have befallen the Government upon the withdrawal of this guilty plea and misinterpret the nature of the "plea bargain" entered into below. In short, the motion was properly denied.

Rule 32(d) of the Federal Rules of Criminal Procedure provides:

> "A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

The voluntary entry of a plea of guilty is a grave and solemn act; having made such a plea, a defendant has no absolute right to withdraw it, even prior to sentence. *Brady* v. *United States*, 397 U.S. 742, 748 (1970); *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975); *United States* v. *Fernandez*, 428 F.2d 578, 580 (2d Cir. 1970). A motion under Rule 32(d) for withdrawal of a plea of guilty is addressed to the discretion of the court and the defendant carries the burden of satisfying the trial judge that there are grounds for such withdrawal. *United States* v. *Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971); *United States* v. *Fernandez*, *supra*; *United States* v. *Giuliano*, 348 F.2d 217 (2d Cir.), *cert. denied sub nom. Prezioso* v. *United States*, 382 U.S. 939 (1965). The trial judge's determination whether that burden has, or has not, been met will be upset on appeal "only if clearly erroneous." *United States* v. *Lombardozzi*, *supra*, 436 F.2d at 881; *United States* v. *Podell*, 519 F.2d 144, 148 (2d Cir.), *cert. denied*, 423 U.S. 926 (1975); *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir. 1964). This is true, among other reasons, because it is the trial judge who has had an opportunity to observe the defendant's

plea and in some instances, as here, it is he who had heard testimony concerning the issues involved in the case. See *United States* v. *Fernandez*, *supra*, 428 F.2d at 580 n. 2; *United States ex rel. Rivera* v. *Follette*, 395 F.2d 450, 452 (2d Cir. 1968).

At the outset, it must be noted that Michaelson's characterization of his guilty plea as an "*Alford*-type" plea (Br. 4-6) is not only totally unsupported by the record but is irrelevant to the issues that were presented to Judge Duffy by Michaelson's motion to withdraw his plea and is equally irrelevant to this Court's review of Judge Duffy's ruling on that motion. A plea of guilty is proper—and fully binding upon the defendant—even though it may have been prompted by tactical considerations, such as the defendant's desire to reduce the maximum possible prison sentence, to avoid the agony and expense of a trial, or to foreclose the introduction at trial of highly incriminating evidence. See *Brady* v. *United States*, *supra*, 397 U.S. at 750.* Thus, in the instant case this Court's review of the District Court's ruling is limited solely to an examination of whether the District Court abused its discretion in denying Michaelson's motion for withdrawal of the plea. See *United States* v. *Smiley*, 322 F.2d 248, 249 (2d Cir. 1963).

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* Furthermore, a "tactical" plea of guilty may not be withdrawn simply because the defendant's tactics proved to be miscalculated. *Brady* v. *United States*, *supra*, 397 U.S. at 757; see also *United States ex rel. Rosa* v. *Follette*, 395 F.2d 721, 725-27 (2d Cir.), *cert. denied*, 393 U.S. 892 (1968). In *United States* v. *Giuliano*, *supra*, 348 F.2d at 223, this Court noted:

> "[The] request [to withdraw the guilty plea] was made only after the Court made it clear that Prezioso could expect to serve some time in prison, thus putting to rest any hope of receiving a suspended sentence. To permit the withdrawal of the plea at this stage would encourage entering the plea merely as a trial balloon to test the attitude of the trial judge. This stratagem has been properly condemned. *United States* v. *Wecse*, 145 F. 2d 135 (2d Cir. 1944)."

Weighing all of the circumstances presented by Michaelson's motion, it is clear that the District Court's ruling was eminently correct. Michaelson conceded to the Court below, as he concedes on appeal (Br. 4), that prior to his guilty plea he was aware of whatever circumstances existed that might support a defense of entrapment had he proceeded to trial, and indeed that this had always been his planned defense. Yet Michaelson offers no "substantial reason"—as he must—to explain why he failed to assert this defense at the time of his guilty plea.*

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* Instead Michaelson claims that since he "continued to protest his innocence, even during the taking of the plea," he should have been allowed to withdraw that plea. (Br. 14). This claim is totally refuted by the record. During his plea, Michaelson frankly admitted to Judge Duffy that he had been neither entrapped nor put in such immediate fear that would support a coercion defense.

> "Defendant Michaelson: . . . After the second meeting, I felt I was—*I don't want to use the word 'entrapped'* I just felt I was in this thing, I couldn't get out of it anymore . . .
>
> * * *
>
> Defendant Michaelson: May I make one statement? I don't know if it is—at the time of the purchase order, I was afraid, sir, not to sign it, *but I knew I could have gone to the authorities.* I acted stupidly. I should have gone to the authorities." (App. 22, 24) (Emphasis supplied).

To grant a defendant's withdrawal motion premised upon claims directly contrary to the respresentations he made at the time of his plea requires "a reason of genuinely compelling force." *United States* v. *Barker, supra,* 514 F.2d at 223.

Moreover, Michaelson's attorney, Mr. Slotnick, advised the Court prior to its acceptance of the plea that he knew of no reason why the plea should not be accepted.

> "The Court: Mr. Slotnick, do you know of any reason why I should not accept the plea of guilty in this case?
>
> Mr. Slotnick: No. I have evaluated the case, your Honor, and I think it is in the best interest of the defendant to take the plea. I know of no reason." (App. 23).

[Footnote continued on following page]

United States v. *Barker*, *supra*, 514 F.2d at 221; *United States* v. *Giuliano*, *supra*, 348 F.2d at 222-23.

Furthermore, the denial of Michaelson's motion was clearly correct in light of the obvious prejudice to the Government that would have resulted had Michaelson been allowed to withdraw his plea. See *United States* v. *Lombardozzi*, *supra*, 436 F.2d at 881; *United States* v. *Barker*, *supra*, 514 F.2d at 222; *United States* v. *Stayton*, 408 F.2d 559, 561-62 (3d Cir. 1969); 8A Moore's Federal Practice ¶ 32.07[2] (2d ed. 1973). In *Lombardozzi*, the defendant voluntarily pleaded guilty in the course of his trial after the Government had spelled out its case against him and called its principal witness. In affirming the denial of the defendant's pre-sentence motion to withdraw his plea, this Court accepted the trial judge's conclusion that the Government would have been substantially prejudiced by the granting of that motion:

> " 'The defendant entered his plea after he heard Negri [the principal government witness] testify * * *. You do not assemble a case of this kind for trial twice. The problem of double jeopardy, and everything else, would have to be faced. When a plea is taken in the middle of trial, it has to be taken with the utmost deliberation simply because the public's right is going to be compromised if there is something wrong with the plea-taking'." (436 F.2d at 881.)

When, as here, a defendant who pleads guilty has had "the full benefits of competent counsel at all times," the reasons given to support the withdrawal of his plea "must have considerably more force." See *United States* v. *Barker*, *supra*, 514 F.2d at 222 (and the cases cited therein); *United States* v. *Lombardozzi*, *supra*, 436 F.2d at 880-881; *United States* v. *Komitor*, 392 F.2d 520, 521 (2d Cir.), *cert. denied*, 393 U.S. 827 (1968).

Furthermore, as the Court of Appeals for the District of Columbia Circuit recognized in *United States* v. *Barker, supra*, 514 F.2d at 222, prejudice results both to the Government and to the court whenever a defendant is allowed to withdraw a guilty plea and thereby remove himself from an ongoing trial which continued in his absence to a verdict against co-defendants.

> "The most common form of prejudice is the difficulty the Government would encounter in reassembling far-flung witnesses in a complex case, but prejudice also occurs where a defendant's guilty plea removed him from an ongoing trial of co-defendants, who were then found guilty. 8A J. Moore, Federal Practice ¶ 32.07[2] (2d ed. 1973). That withdrawal would substantially inconvenience the court is also a proper factor for consideration. *Everett* v. *United States, supra*, 119 U.S. App. D.C. at 65, 336 F.2d at 984; *Pelletier* v. *United States, supra*."

In this case, the Government, having tried and convicted Michaelson's co-defendants and, thereby, having incurred considerable expense in prosecuting a relatively lengthy case and exposed its case and its witnesses to Michaelson, would have been substantially prejudiced by the belated withdrawal of Michaelson's guilty plea and the resulting duplication of its efforts at a second trial of Michaelson alone.* In view of this substantial prejudice, the District

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* This prejudice is underscored by the fact that at trial the District Court twice denied Michaelson's application for a severance. (Transcript of *Voir Dire*, dated September 20, 1976, at 18-19; Tr. 33). To permit Michaelson to enter—and then later withdraw—his guilty plea would effectively provide him with an avenue to circumvent the Court's adverse ruling on his severance motion.

Court properly exercised its discretion by refusing to allow Michaelson to take back his plea.

Finally, Michaelson's assertion that the Government breached a plea bargain agreement (Br. 15) is unsupported in fact and in law. The "plea bargain" to which Michaelson apparently refers was a representation made to his attorney by the Government that upon Michaelson's plea of guilty to Count Four of the indictment, (1) the Government would consent to the dismissal of Counts One, Two and Three at the time of sentencing (App. 19),* and (2) the Government would *not* take any position with respect to the sentence Michaelson should receive, but *would* relate to the Probation Office and the Court whatever information it had concerning Michaelson's participation in this conspiracy. (App. 34, 51).

Unable to claim that the Government ever made a specific recommendation as to the sentence Judge Duffy should impose upon him, Michaelson nevertheless argues that the Government "accomplished this end" by assessing for the Probation Office the relative culpability of all of the defendants, including Michaelson.** (Br. 15). This is simply not true. An assessment of relative culpability is customarily provided to the Probation Office upon request in multi-defendant cases. It represents a summari-

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* On November 22, 1976, Counts One, Two and Three were indeed dismissed upon the consent of the Government following the sentencing of Michaelson on Count Four.

** Michaelson is incorrect when he asserts that the Government told the Probation office that it "viewed appellant as *the* most culpable of his co-defendants." (Br. 15). In fact, the Government's position was that among the five American defendants, two played lesser roles in this conspiracy, while Michaelson and the remaining two defendants played greater roles. This two-tier evaluation was the extent of the Government's assessment of the relative culpability of these five defendants (App. 52).

zation of each defendant's contacts with the conspiracy relative to those of his co-conspirators. As such, it is precisely the type of information that the Government told Michaelson's attorney it would convey to the Probation Office. The assessment did not purport to ascribe to any defendant an absolute degree of culpability, nor did it carry an actual or implied recommendation of sentence.

In *United States* v. *Needles*, 472 F.2d 652, 654-55 (2d Cir. 1973), this Court addressed—and rejected—the precise contention raised by Michaelson. In language particularly appropriate here, the Court held:

> "Needles was told only that the Government would move to dismiss the remaining 29 counts of the indictment. This promise was kept at a substantial advantage to defendant, since his potential term of imprisonment was reduced considerably. Appellant's only claim of misrepresentation is that he believed that the prosecutor would make no recommendation as to sentence, that the information contained in the report could only have come from the prosecutor, and that this amounted to bad faith. . . . [N]o defendant can reasonably expect the probation office to refrain from seeking whatever information the prosecutor may have regarding the case then before the court or any other case involving that defendant. In fact, failure to so inquire or refusal to respond accurately would be a breach of duty. What appellant's argument is reduced to, in the last analysis, is that the information that led to a 30-count indictment should have been hidden from the sentencing judge and that appellant could reasonably have so expected. The argument falls of its own weight."

In conclusion, Michaelson's claims must be seen in context. He pleaded guilty on the third day of a long-awaited trial, after the opening statements revealed the nature of the Government's case and long after, as he admits (Br. at 4-5), he had explored the defenses he now claims would have prevailed had there been a trial. Michaelson's resurrected desire to litigate previously-abandoned defenses—prompted, no doubt, by his obvious dissatisfaction with his presentence report *—and his accusations of impropriety on the part of the Government ** were unsupported and insufficient to overcome the substantial prejudice to the Government that would have resulted from the withdrawal of his plea. The District Court's denial of his withdrawal motion, therefore, was entirely proper.

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* A motion under Rule 32(d) should be denied if it appears that the defendant is merely attempting to avoid the imposition of a stricter sentence than he had originally expected to receive at the time he pleaded guilty. For example, in *High* v. *United States*, 288 F.2d 427, 431 (D.C. Cir. 1961), the Court held:

> "If the motion was made only because the accused had learned that, contrary to his expectation, he would receive a jail sentence, we think the trial judge was acting within his discretion in denying the request or motion."

See also *United States* v. *Barker*, *supra*, 514 F.2d at 220.

** Not only does Michaelson accuse the Government of violating a plea agreement, but he also asserts that the Government withheld from the defense certain unidentified "Brady" material which, he alleges, would have proven the Government's informer, Tony Stagg, to be "a viscious [sic], ruthless gangster" who had been previously "accused of entrapping people." (Br. 17). This accusation is baseless. The type of material which Michaelson describes is not "Brady", but rather "3500" material—discoverable by the defense only if, and when, Mr. Stagg were called as a Government witness at the trial. The non-disclosure of such material does not entitle Michaelson to the withdrawal of his guilty plea. Indeed, such a claim was rejected in almost precisely the same context in *United States* v. *Giuliano*, *supra*, 348 F.2d at 223.

POINT II

Michaelson's plea was properly entered in accordance with Rule 11 of the Federal Rules of Criminal Procedure.

Michaelson further contends, for the first time in this appeal, that he should have been allowed to withdraw his plea of guilty because that plea was not taken in strict compliance with Rule 11 of the Federal Rules of Criminal Procedure. Specifically, Michaelson claims that Judge Duffy did not establish on the record that Michaelson had acted with the requisite criminal intent (Br. 16) and did not personally advise Michaelson of certain rights, as required by Rule 11(c), (d) and (e). (Br. 17). In so arguing, Michaelson misreads the record of the proceedings below and totally ignores the body of case law prescribing different standards when, as here, a plea is taken not prior to trial as in the recent case of *United States* v. *Journet*, Dkt. No. 76-1285, slip op. 371 (2d Cir., November 1, 1976), but rather in the very course of trial.

For example, Michaelson challenges the plea on the grounds that the District Court failed to advise Michaelson on the record that he would have the right to cross-examine witnesses at trial and further that by pleading guilty he was waiving the right to trial. (Br. 17). The record does not support these claims. In fact, prior to accepting this plea, Judge Duffy told Michaelson that if he persisted in his plea of not guilty, "you would be entitled and would have a trial before either myself or a jury and myself." (App. 19). The court further advised Michaelson that "you have the right through your counsel, who is one of the more able attorneys I have seen come

into court in about four years, to cross-examine the witnesses against you." (App. 20).*

Michaelson further misreads the record when he argues that the "plea agreement" in this case was not developed on the record by the Court, as required by subsections (d), (e)(2)** and (e)(3) of Rule 11. The "plea agreement" in this case, to which Michaelson refers, is the representation that was made to Michaelson's attorney by the Government that upon Michaelson's entry of a plea of guilty to Count Four, it would not oppose the dismissal of the other three counts of the indictment

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* Michaelson correctly points out that the District Court did not specifically advise him of his right not to be compelled to incriminate himself and of the fact that if his allocution were conducted under oath, on the record and in the presence of counsel, Michaelson's statements could be used against him in a prosecution for perjury or false statement. (Br. 17). However, the failure of the court to so advise Michaelson did not mandate withdrawal of the plea, because Michaelson was not thereby prejudiced in any way. At the time of sentencing (*i.e., after* Michaelson had moved for permission to withdraw his plea), his attorney not only made no claim that Michaelson misunderstood his rights in this regard but informed the court that it had always been the strategy of the defense that Michaelson *would testify* at trial in order to establish his defense of entrapment. (App. 56-57). Thus, Michaelson clearly did not enter his guilty plea out of an ignorant relief that the Government could force him to take the stand against his will. Nor did any prejudice result from the fact that Judge Duffy did not reveal to him that his statements could be used against him in a prosecution for perjury or false statements. Rule 11(c)(5) provides that a defendant should be told that "*if he answers* [the Court's] *questions under oath*, on the record, and in the presence of counsel," his answers may be used against him in prosecution for perjury or false statement. Since Michaelson was never placed under oath, this provision was obviously inapplicable to him.

** Although Michaelson cites to Rule 11(*c*)(2) in his brief (Br. 17), the reference obviously should be to Rule 11(*e*)(2).

at the time of sentencing. The transcript of the plea reveals that this agreement was indeed placed on the record—by *Michaelson's attorney*, Mr. Slotnick:

> "Mr. Slotnick: Your Honor, most respectfully at this time the defendant Robert Michaelson desires to withdraw the plea of not guilty to indictment number 76 Cr. 503 and enter a plea of guilty to the Fourth Count of the indictment, to wit, that he aided and abetted pursuant to Section 18, United States Code 1001, in making out a false purchase order, knowing that it would be filed with the State Department. *To cover this indictment* and whatever other investigations Mr. Fiske might have——
>
> The Court: Wait.
>
> Mr. Slotnick: *To cover this indictment.*" (App. 19) (Emphasis supplied).

Similarly, Michaelson's claim that he never told Judge Duffy "that he took *any* action, much less 'knowing' that it was criminal," and thus that there was no "factual basis for the plea" required by Rule 11 (f) (Br. 16-17), is contradicted by the transcript of his plea, wherein he admitted that he had participated in meetings at which the filing of the false purchase order was discussed and, further, that he had "acted stupidly" at the time he signed the purchase order.

> "The Court: Tell me what went on with this.
>
> Defendant Michaelson: Generally, sir?
>
> The Court: Yes.
>
> Defendant Michaelson: I was induced to attend that first meeting.
>
> The Court: And you did?

Defendant Michaelson: And I did, yes. It attended the first meeting, I was then induced to attend a second meeting.

The Court: Yes, I want to hear exactly what went on.

Defendant Michaelson: Then induced to go to a second meeting. I attended the second meeting. After the second meeting, I felt I was—I don't want to use the word 'entrapped,' I just felt I was in this thing, I couldn't get out of it anymore. I was never in trouble in my life."

* * * * *

"The Court: Did you know that somebody was going to file a statement in connection with the guns involved?

Defendant Michaelson: There were discussions at the meetings, sir, yes, that there had to be a purchase order filed.

The Court: You knew about it at the time?

Defendant Michaelson: When the purchase order was filed, I knew about it, yes, sir.

* * * * *

"Defendant Michaelson: May I make one statement? I don't know if it is—at the time of the purchase order, I was afraid, sir, not to sign it, but I knew I could have gone to the authorities. I acted stupidly. I should have gone to the authorities." (App. 21-24).

Michaelson's persistent misstatement of the record is compounded by his failure to realize that the acceptability of his plea of guilty, entered as it was *during* trial, is to be judged using the entire trial record, and that the

sufficiency of the plea simply cannot be judged by considering the defendant's own statements in isolation.* *United States* v. *Podell*, *supra*, 519 F.2d at 149-50; *Iribarry* v. *United States*, 508 F.2d 960, 967 (2d Cir. 1974). The trial record that had preceded the entry of the plea amply developed for the trial court the facts of Michaelson's knowing and wilful participation in the conspiracy alleged in the indictment. During his opening statement, the United States Attorney had outlined to the court and jury how Michaelson had arranged and attended the first of several undercover meetings in March 1976, at which he set in motion the conspiratorial scheme charged in the indictment. (Tr. 10-12). The Government's opening statement also detailed the active role taken by Michaelson in the completion of some of the false documentation filed with the State Department in May 1976. (Tr. 17-20). Since Michaelson was present during this opening statement, and since his guilty plea closely followed it, the trial court was fully justified in considering the statement to determine the "accuracy" of the plea. Rule 11 (f).

In addition, at the time of Michaelson's plea, his attorney informed the court that Michaelson was pleading guilty to aiding and abetting the submission of the "false

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* The validity of the established law in this circuit that a trial judge may consider statements other than admissions made by the defendant in determining whether there is a "factual basis" for the plea, *United States* v. *Navedo*, 516 F.2d 293, 298 n.10 (2d Cir. 1975), is clearly reflected in Rule 11 of the Federal Rules of Criminal Procedure. While Rule 11(c) and (d) each explicitly refer to a requirement that the court address the defendant "personally," Rule 11(f), requiring that the court determine the "accuracy" of the plea, only requires that the District Court make "such inquiry as shall satisfy it that there is a factual basis for the plea."

purchase order, knowing that it would be filed with State Department." (App. 19). Thus, at the time Michaelson offered his plea, the entire record before the District Court more than established a factual basis for the acceptance of that plea. Consequently, the Court did not err when it accepted the plea.

POINT III

The District Court did not abuse its discretion when it refused to adjourn Michaelson's sentence.

Claiming that "the Court below did not receive [at trial] one-fifth of the testimony available to the appellant," Michaelson contends that Judge Duffy committed error by "refusing the appellant sufficient time to respond to the voluminous evidence needed to show his side of the story." (Br. 15-16). In light of the fact that a full two months expired between the entry of Michaelson's plea and the date of his sentencing, and that six weeks elapsed between the conclusion of his co-defendants' trial and his sentencing, this claim is meritless. While a defendant should be given an opportunity prior to sentencing to state his version of the facts, see *United States* v. *Virga*, 426 F.2d 1320, 1323 (2d Cir. 1970), *cert. denied*, 402 U.S. 930 (1971), it is within the discretion of the District Court to determine how and when this is to be done. *United States* v. *Needles*, *supra*, 472 F.2d at 658. The District Court properly exercised that discretion.

At the time of his plea, Michaelson was encouraged by Judge Duffy to give an honest account of his activities to the Probation Office. (App. 24). At the same time, Michaelson's attorney promised to furnish to the Court "extensive presentence memoranda." (App. 25-26). In

the intervening two months, however, Michaelson did not submit any memoranda to Judge Duffy relevant to the Court's determination of his sentence, although he did speak to the Probation Office, which included his version of the facts in the presentence report it submitted to Judge Duffy. Further, Mr. Slotnick presented at length Michaelson's factual contentions to the Court at the time of sentencing. (App. 55-63). Under these circumstances, Michaelson had ample opportunity to present his side of the story and to verbally rebut any alleged misinformation in the presentence report.* Thus, the Court did all that was required. *United States* v. *Rosner*, 485 F.2d 1213, 1230 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Needles*, *supra*, 472 F.2d at 658.

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* In spite of Michaelson's claim on appeal that he should have been allowed more than six days to rebut information appearing in the presentence report (Br. 15-16), he has never explained in the District Court or on appeal what items of information in that report, if any, he takes exception to. Indeed, in his attorney's November 13, 1976, letter to Judge Duffy, Michaelson requested an adjournment of the sentencing based on (1) his recent receipt of "some 300 pages of extremely volatile material," (2) "other evidence that . . . was never brought to the Court's attention through trial," and (3) "legal matters which demand greater attention than the present scheduling period permits" (App. 29); he did *not* mention any inaccuracy in the pre-sentence report. The facts of this case are thus radically different from those in *United States* v. *Robin*, Dkt. No. 76-1033, slip op. 5829 (2d Cir., October 15, 1976), upon which Michaelson relies. In *Robin*, the pre-sentence report, which contained many allegations wholly beyond the matters for which the defendant was indicted, was not available to the defendant until the morning of sentence. Slip op. 5831. Furthermore, the defendant in *Robin* was sentenced on the basis of his guilty plea alone; the court did not have *any* trial involving the same subject matter from which to inform itself of the facts of the case. Finally, Robin raised specific claims of allegations in the pre-sentence report that he disputed; Michaelson has made none.

Michaelson's final contention that "at a minimum" the Court should have held an evidentiary hearing on his withdrawal motion (Br. 18) is equally unavailing. It is well within the discretion of a District Court to deny such a hearing where, as here, the defendant has had ample opportunity to present verbally and in writing his version of the salient facts, see *United States* v. *Rosner*, *supra*, 485 F.2d at 1230; *United States* v. *Needles*, *supra*, 472 F.2d at 657-58, and where he has failed to establish or even to indicate in detail the evidentiary facts that would be adduced at such a hearing, see *Michel* v. *United States*, 507 F.2d 461, 464 (2d Cir. 1974).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAMES A. MOSS being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of January, 1977, he served ~~a copy~~ 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

BARRY IVAN SLOTNICK, ESQ.
233 BROADWAY
NEW YORK, NEW YORK

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

JAMES A. MOSS
A.U.S.A.

Sworn to before me this
10th day of January, 1977.

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978